Supreme Court, U.S.
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No. 97-960

In The

Supreme Court of the United States

October Term, 1997

K.R., AN INFANT BY HER PARENTS
AND NEXT FRIENDS M.R.
AND K.R.R., AND M.R. AND K.R.R.,

Petitioners,

v.

ANDERSON COMMUNITY SCHOOL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM R. CLIFFORD
Counsel of Record
DAVID W. GOTSHALL

30 West Eleventh Street
Anderson, Indiana 46016
(317) 641-2135
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

Whether 20 U.S.C. Secs. 1400 et seq. (IDEA) and the IDEA Amendment Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997) require Anderson Community School Corporation to provide K.R., a child with disabilities as defined in IDEA, with an instructional assistant on the site of a private parochial school where K.R.'s parents have voluntarily chosen to enroll her when K.R. is virtually wheelchair bound and the private parochial school is not handicapped accessible.

Petitioners raise a second issue contending that Anderson Community School's conduct violates the neutrality principle under the First Amendment. Respondent objects to the presentation of this issue as it was raised for the first time in Petitioners' original Petition before this Court.

Whether Petitioners have standing to bring suit in light of the IDEA Amendment Act of 1997.

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JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The same Court's order denying Rehearing was entered on May 28, 1996. On August 26, 1996, Petitioner filed a Petition for Certiorari. On June 27, 1997, the Supreme Court of the United States granted certiorari and remanded the cause to the Seventh Circuit Court of Appeals for further consideration in light of the IDEA Amendment Act of 1997. The Seventh Circuit Court of Appeals again ruled on September 10, 1997 and Petitioner again seeks certiorari. The jurisdiction of this Court is based on 28 U.S.C. Sec. 1254. The District Court jurisdiction was based on 20 U.S.C. Sec. 1415(e) and 28 U.S.C. Sec. 1331.

STATUTORY AND REGULATORY PROVISIONS

The relevant Federal statutes in this cause are 20 U.S.C. Sec. 1400 et seq., Individuals with Disabilities Education Act (IDEA), and the IDEA Amendment Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997), Federal regulations involved include 34 C.F.R. Sec. 300.403, 450-460, 506-511, 552; 34 C.F.R. Secs. 660-663 and the proposed regulations Sec. 300.454 through 300.457, Indiana Statute, IC 20.1.6.4.

STATEMENT OF THE CASE

Respondent will follow generally the format adopted by Petitioner.

A. Statutory and Regulatory Scheme: Part B of IDEA provides for Federal grants to be made through the state (SEA) to local education agencies (LEA) to assist in funding educational services for students with disabilities. As required by 20 U.S.C. Sec. 1412, Indiana has agreed to accept the provisions of IDEA. IC 20-1-6-4. Regulations have been adopted pursuant to 20 U.S.C. Sec. 1417.

A state which accepts the benefits of IDEA must have in effect a policy which assures all children with disabilities the right to a free appropriate public education (FAPE) and a plan assuring such an education is available. 20 U.S.C. Sec. 1412(1) and (2)(B). Each child identified as being disabled as defined by IDEA and regulations must be provided an individual education plan (IEP) that identifies the special education and related services necessary to meet the child's needs and must offer to provide those services at public expense. 20 U.S.C. Secs. 1412(4), 1414(a)(5).

Respondent adopts the Seventh Circuit's statement of the facts found on pp. 2-3 of its original decision and which read as follows:

> It is not disputed that K.R. is a child with disabilities who is eligible under the IDEA for special educational and related services. K.R. was a six-year-old kindergarten student at the time this dispute arose. She suffers from

myelomeningocele, spina bifida, and hydrocephalus with a shunt, which create difficulties with expressive language, motor skills, and mobility, requiring her to use a wheelchair. She thus needs assistance with positioning for activities, reaching and grasping, self-help skills, motor movements, mobility, and expression. Implementation of her IEP (determined in conformity with the IDEA) requires, among other necessary related services, a full-time instructional assistant.

K.R. received services from community agencies prior to attending public school at Anderson Community Schools. At age three, K.R. was enrolled in the pre-school program at the public school where she received various services related to her disabilities. In the spring and summer of 1993, case conference meetings were held to work out K.R.'s IEP for the 1993-94 school year in anticipation of her continued attendance at public school. The IEP provided for placement in a kindergarten class with related services for speech therapy, occupational therapy, transportation, and a full-time instructional assistant. During the conference, K.R.'s parents asked whether K.R. would receive all of the services if she attended St. Mary's School, a private parochial school. The public school told K.R.'s parents that it would not provide an instructional assistant if she attended private school. Nonetheless, K.R.'s parents voluntarily enrolled her at St. Mary's for kindergarten. During K.R.'s attendance at St. Mary's the public school has provided K.R. with speech therapy, occupational therapy, and physical therapy at a public school site, as well as transportation to that site. Since the local system determined that

it would not provide K.R. with an instructional assistant on site at the private school, and since St. Mary's chose not to provide the service itself, K.R.'s mother attended St. Mary's with her to fulfill the duties of an instructional assistant prior to the District Court's decision.

K.R.'s parents requested a due process hearing, which was held on October 26, 1993. The hearing officer concluded that the public school is not obligated to provide an instructional assistant at the private school. The Indiana Board of Special Education Appeals upheld the decision on April 7, 1994. Having exhausted their administrative remedies, K.R. and her parents filed a complaint in the District Court. On May 25, 1995, the District Court issued a permanent injunction and declaratory judgment holding that the public school was required to provide a full-time instructional assistant at the private school. *K.R. ex rel. M.R. v. Anderson Community Sch. Corp.*, 887 F. Supp. 1217 (S.D. Ind. 1995). The District Court based its decision on a regulation that requires the special education services to private school students be "comparable" to the services provided to public school students.

In addition, Respondent would note that St. Mary's school is not wheelchair accessible. (Hearing officer's decision-finding of facts nos. 7 and 8 found at pp. A-51 to A-52 in the appendix to Petitioners' Petition). The school corporation has accessible facilities for wheelchair bound students.

The Seventh Circuit Court of Appeals overturned the District Court ruling on April 12, 1996. The Seventh Circuit held at page 11-12 of its decision (A-17, A-18 of Petitioner's appendix):

> We conclude that the IDEA and its regulations do not require a public school to make comparable provisions for a disabled student voluntarily attending private school as for disabled public school students. Rather, public schools are given discretion under the law and need only provide voluntarily placed private school students a genuine opportunity for equitable participation. Here, Anderson Community School afforded K.R. a genuine opportunity for the services of an instructional assistant at a public school, and she declined. Further, the public school's provision of other related services demonstrates that it reasonably exercised its discretion rather than eschew its responsibility once K.R. chose to attend private school. The decision of the District Court is therefore reversed.

Petitioners filed a Petition for Rehearing which was denied on May 28, 1996.

Petitioners filed a Petition for Certiorari on August 26, 1996. On June 27, 1997, the Supreme Court of the United States granted certiorari and remanded this case, along with other cases from other circuits pending which dealt with similar issues, for further consideration in light of the IDEA Amendments of 1997.

On September 10, 1997, the Seventh Circuit Court of Appeals again reversed the district court holding that the

clarifications provided in the amendments further support its original decision. The Court also denied Petitioners' new contention that Respondent's actions violated the First Amendment.

SUMMARY OF ARGUMENT

1. Under IDEA, its regulations, the IDEA Amendment Act of 1997, and the proposed regulations thereto, the decision of the Seventh Circuit Court of Appeals was correct. Both the statute, in its original form and as amended, and the accompanying regulations (plus the proposed regulations) provide that a public school district is not required to provide related services at the private school site when the child's parents have voluntarily placed the child at the private school.

The decision of the Seventh Circuit is not in substantial conflict with the Tenth Circuit's decision as far as the prospective application of IDEA as amended.

2. The second argument made by Petitioners is that Respondent's conduct constitutes a violation of the neutrality principle under the establishment clause of the First Amendment.

Respondent objects to any consideration of this issue because it was not raised originally in this matter. It was raised for the first time in Petitioners' prior Petition for Certiorari. In any case, Respondent's actions do not constitute a violation of the First Amendment's neutrality requirement.

3. Petitioner no longer has standing to bring suit because IDEA, as amended, clarifies that no private school student has an individual right to receive special education or related services and that the due process provisions of IDEA are not applicable in such an instance.

ARGUMENT

1. Petitioners first argue that the Seventh Circuit's decision conflicts with *Zobrest v. Catalina Foothills Schl. Dist.*, 113 S. Ct. 2462, 125 L. Ed. 2d 1 (1993). That case dealt only with the constitutionality of providing a sign language interpreter at a parochial school. The Court specifically refused to address the statutory and regulatory arguments. See 113 S. Ct. at 2465-2466. The language from *Zobrest* cited by Petitioner at p. 10 of its brief is in support of the proposition that providing a sign language interpreter on-site at the parochial school is a neutral service and therefore not a violation of the Establishment Clause. In no way can the language cited from *Zobrest* be interpreted as holding that IDEA *mandates* providing an instructional assistant on-site.

The proposed regulations to the IDEA as amended recognize the permissive (but not mandatory) basis of *Zobrest* where in Sec. 300.456(a) it is provided that services *may* be provided on-site at the private school to the extent consistent with law. A note to the section specifically references *Zobrest*. However, the regulation is clearly permissive and not mandatory. Nothing in the

Seventh Circuit's decisions would prohibit providing services on-site at a private school. It is therefore not in conflict with *Zobrest*.

Petitioners argue that the Seventh Circuit's decision is not well founded because of its reliance on *Goodall v. Stafford County Schl. Bd.*, 930 F.2d 363 (4th Cir. 1991) which was decided before *Zobrest*. However, *Goodall* was revisited by the Fourth Circuit in 1995 wherein the Court stated:

> "[W]e note that in *Goodall I*, we held that the Individuals with Disabilities Education Act (IDEA) . . . did not dictate that Stafford County must provide or pay for the services requested by the Goodalls in Mathew's Christian School. 930 F.2d at 369. That portion of our opinion was not overruled by *Zobrest*. . . . and cannot be challenged in the instant appeal." *Goodall by Goodall v. Stafford County Schl. Bd.*, 60 F.3d 168, 173 (4th Cir. 1995)

Petitioners next argue that the Seventh Circuit is wrong when it holds that IDEA provides lesser rights for children who are voluntarily placed by their parents in private schools. Not only was the Seventh Circuit correct in its holding of a lesser right but in fact the amendments make clear that such a child has no individual right to services. Proposed regulation Sec. 300.454(a) provides that, "No private school child with a disability has an individual right to receive some or all of the special education and related services that a child would receive if enrolled in a public school." Sec. 300.455 requires provision of "comparable services" but defines that comparable in quality does not require the same amount of

service for private school children and does not require that any particular child receive service. Sec. 300.457 provides that private school students are not entitled to the due process provisions of the Act.

Petitioners argue that since the public school must create an IEP for all students that it therefore follows that the services must be provided. The purpose of the act is not to insure a free *private* education only a free *public* education. The public school must insure that all eligible children are identified and provided an IEP. If the parents then place the child in a private school then the public school is not required to pay for it as long as a free appropriate public education is available. Sec. 101 of the IDEA Amendments Act, amending Sec. 612(a)(10) of IDEA provides that the law

> " . . . does not require a local educational agency to pay for the cost of education, including special education *and related services*, of a child with a disability at private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 111 Stat. 63 (emphasis added).

Petitioners argue that this is in conflict with Sec. 612(a)(18)(C). This is not so. That proviso in no way mandates use of local dollars for private school students. It is not even applicable if a free appropriate public education is available. Petitioners are trying to create a right to a free *private* education but Section 101 of the Amendments makes clear that is not the purpose of the Act.

Petitioners contend that *Board of Ed. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S.Ct. 2481, 2485 (1994) supports their position. This contention is incorrect. First, as Justice Scalia notes in his dissent:

> Unlike most of our Establishment Clause cases involving education, these cases involve no public funding, however slight or indirect, to private religious schools. They do not involve private schools at all. The school under scrutiny is a public school specifically designed to provide a public secular education to handicapped students." 114 S. Ct. at 2506.

Secondly, the quoted language is mere dictum. Thirdly, the quoted language speaks of "handicapped children" generally and in the plural, not each handicapped child individually. Respondent agrees that handicapped, private school children as a class have certain rights to some services under IDEA. However, *Kiryas Joel* does not hold that a voluntarily placed private school student has an individual right to services and the Seventh Circuit's decision is not in conflict with *Kiryas Joel*. As noted previously, the Amendments clarify that a private school student has no individual right under IDEA.

Petitioners next argue that the Court's decision changes the definition of "comparable benefits." They cite *Wheeler v. Barerra*, 417 U.S. 402, 94 S. Ct. 2274, 41 L. Ed. 2d 159 (1974) in support of their argument. *Wheeler* dealt with Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. 241 et seq. which has some regulations which are similar to IDEA. *Wheeler* does not support Petitioners' contentions. The Court in *Wheeler* stated:

> "Inasmuch as comparable, and not identical services are required, the mere fact that public school children are provided on-the-premises Title 1 instruction does not necessarily create an obligation to make identical provision for private school children." 417 U.S. at 421-422.

The *Wheeler* Court recognizes the same need for flexibility and discretion as the Court herein recognizes under IDEA. Like IDEA, Title I creates no individual student rights to specific services.

In addition, there are important differences between Title I and IDEA. IDEA clearly distinguishes between public school students and voluntarily placed private school students while Title I regulations "draw no distinction between public and nonpublic school children." *Wheeler, supra,* 417 U.S. at 406 n.2. Title I deals solely with a federally funded program and the allocation of those funds, while IDEA creates obligations for the public school while financing only eight percent of the cost of those obligations. Under IDEA, the *federal* funds may need to be expended on a comparable basis but not the ninety-two percent provided by state and local sources. *Wheeler* provides no support for Petitioners. To the contrary, it provides support for the Seventh Circuit's decision.

The proposed regulations further support the Seventh Circuit decision. Sec. 300.455(c) states:

> "As used in this section, comparable in quality –
>
> (1) Means that services provided private school children with disabilities must be provided by similarly qualified personnel;

> (2) Does not require the same amount of service for private school children with disabilities as for children with disabilities in public schools; and
>
> (3) Does not require that any particular child receive service or receive the same amount of service the child would receive in a public school."

Petitioners next contend that the decision of the Seventh Circuit is in direct conflict with *Fowler v. Unified School Dist. No. 259,* 128 F.3d 1431 (10th Cir. 1997). Respondent disagrees as to the prospective effect of IDEA as amended. *Fowler* would appear to be in conflict with the Seventh Circuit as to the effect of the Act prior to being amended since the amendments were not specifically made retroactive. However, since this application would be so limited it does not merit consideration by this Court on that basis.

Further, the Tenth Circuit was incorrect in determining that the amendments were not intended to simply clarify the law in this area. As the Fifth Circuit noted in *Cefalu v. East Baton Rouge Parish School Bd.,* 117 F.3d 231, 232-233:

> " . . . Congress recognized the difficulty arising from judicial efforts to interpret the IDEA and enacted *clarifying* amendments in order to 'resolve . . . the subject of an increasing amount of litigation in the last few years.' S. Rep. No. 17, 105th Cong., 1st Sess. 13 (1997). These amendments specifically state that an agency is required only to provide students voluntarily enrolled in private schools with a proportionate share of federal funds under the IDEA and is

> not required to pay for the cost of special education services. See IDEA Amendments Act of 1997, Pub. L. No. 105-17, 111 Stat. 37 (June 4, 1997) at Sec. 612(a)(10)." (emphasis in original)

Clearly, the amendments were intended to clarify the Act. Additionally, the decision in *Fowler* was based, in part, on the interpretation of state law which is not an issue in this case. *Fowler* is therefore not on all fours with this case. *Cefalu, supra,* is on all fours with this case and is in accord with the Seventh Circuit.

The only issue on prospective application which might arguably be involved is "whether an equal share of the Federal funds must be allocated for *each* disabled child enrolled in a private school, or whether the proportionate amount be allocated for disabled private schools *collectively.*" *Fowler, supra,* 128 F.3d at 1437. (emphasis in original) This issue is not present in the case at bar as Petitioners have never contended that a proportionate share of Federal funds has not been allocated. Respondent has continued to provide K.R. with speech therapy, occupational therapy and physical therapy at a public school site. *Fowler* made no determination on this issue but remanded the case to the district court to decide.

In any case, the proposed regulations deal with this issue. Sec. 300.455(c) in defining services which are comparable in quality, provides that comparable does not require that any particular private school student receive service or receive the same amount of service as a public school student.

2. Petitioners argue that the conduct of the Anderson Community School Corporation in denying K.R. an

instructional assistant on-site at the private parochial school violates the neutrality principle of the Establishment Clause of the First Amendment.

Respondent objects to Petitioners raising this issue. Petitioners did not raise this issue in the State administrative proceedings or the District Court.

In any case, there is simply no basis for such an argument. If Anderson Community Schools were hostile to religion as alleged, it would not have provided the occupational therapy, physical therapy and speech therapy which it has provided to K.R. Anderson's decision not to provide an instructional assistant on-site was based in part on its belief that the State and Federal laws and regulations gave it the option as to where such services would be provided. Anderson's decision was also based on its belief that St. Mary's was unsafe for K.R., was not the least restrictive environment and was therefore not an appropriate placement. These reasons for rejecting an on-site instructional assistant would apply equally whether the private school were parochial, atheist or non-denominational. There is absolutely no evidence in the record to indicate that Anderson Community Schools are hostile toward religion.

3. Under IDEA as amended, Petitioners no longer have standing to bring this suit. Sec. 300.454(a) 62 Fed. Reg. 55026 (1997) of the proposed regulations provides that no private school child with a disability has an individual right to special education or related services. Sec. 300.457(a) of the proposed regulations provides that

the due process procedures do not apply to private school children.

CONCLUSION

For all the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM R. CLIFFORD
DAVID W. GOTSHALL

Counsel for Respondent
30 West Eleventh Street
Anderson, Indiana 46016
(765) 641-2135